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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 335

THE WESTERN (OLD SETTLER) CHEROKEE INDIANS, ON THE RELATION OF DOROTHEA OWEN, ET AL.,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

WILFRED HEARN,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 335

THE WESTERN (OLD SETTLER) CHEROKEE INDIANS, ON THE RELATION OF DOROTHEA OWEN, THOMAS ROACH, ELLIS CROWELL DUNCAN, ELIZABETH SCHLESHER-LEWIS, ALICE FLOURNOY-SMITH, AND MAXINE WOODALL,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Western (Old Settler) Cherokee Indians, on the relation of Dorothea Owen, and others, pray that a writ of certiorari issue to review the judgment entered in this cause on May 1, 1950, by the Court of Claims.

Opinion Below

The opinion of the Court of Claims (R. 28) is reported in 89 Fed. Supp. 1006.

Jurisdiction

The judgment of the Court of Claims sought to be reviewed was entered on May 1, [redacted] (R. 40). On July 13, 1950, upon consideration of application made therefor on behalf of petitioners for extension of the time within which to file petition for writ of certiorari, Associate Justice Burton made the following order:

> "It is hereby ordered that the time for filing petition for writ of certiorari in the above-styled cause be, and the same is hereby extended to and including September 27, 1950, provided I have the statutory power to extend such time."

The jurisdiction of this court is invoked under Section 20 of the Act of August 13, 1946, 60 Stat. 1091, entitled "An Act, to create an Indian Claims Commission, to provide for the powers, duties and functions thereof, and for other purposes," and Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. Sec. 288(b).

Questions Presented

1. Whether the failure of the United States to observe the rule of partial payments in taking credit for payments made on a long overdue interest bearing account with an Indian tribe conformed to the duty to deal fairly and honorably.

2. Whether either the common law or statutory law, with respect to the liability of the United States for interest on moneys due, but withheld, which by contract bear interest, prohibits the application of the rate of partial payments.

3. Whether the Act of February 25, 1889 (25 Stat. 694), or the Act of March 3, 1919 (40 Stat. 1316), or the Act of April 25, 1932 (47 Stat. 1316) conferred jurisdiction on the Court of Claims to hear and determine a claim of petitioners

for losses arising from the failure of the United States to apply the rule of partial payments in making payments on account of an interest bearing debt long past due, in the absence of treaty stipulation providing for the application of that rule.

Statutes Involved

The pertinent portions of the Act of August 13, 1946 (60 Stat. 1049), creating the Indian Claims Commission are as follows:

> "Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; *and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.*
>
> * * * * * * *
>
> "Sec. 11. Any suit pending in the Court of Claims or the Supreme Court of the United States or which shall be filed in the Court of Claims under existing

legislation, shall not be transferred to the Commission: Provided, *That the provisions of section 2 of this Act, with respect to the deduction of payments, offsets,* counterclaims and demands, shall supersede the provisions of the particular jurisdictional Act under which any pending or authorized suit in the Court of Claims has been or will be authorized: *Provided further, That the Court of Claims in any suit pending before it at the time of the approval of this Act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit.*" (Italics Supplied).

The pertinent portion of the jurisdictional Act of February 25, 1889 (25 Stat. 694), is as follows:

"That the claim of that part of the Cherokee Indians, known as the Old Settlers or Western Cherokees, against the United States, which claim was set forth in the report of the Secretary of the Interior to Congress of February third, eighteen hundred and eighty-three (said report being made under Act of Congress, of August seventh, eighteen hundred and eighty-two) and contained in Executive Document Number Sixty of the second session of the Forty-seventh Congress be and the same hereby is, referred to the Court of Claims for adjudication; and jurisdiction is hereby conferred on said court to try said cause, and to determine what sum or sums of money, if any, are justly due from the United States to said Indians, arising from or growing out of any treaty stipulations and acts of Congress relating thereto, after deducting all payments heretofore actually made to said Indians by the United States, either in money or property; • • •"

The pertinent portion of the jurisdictional Act of March 3, 1919, 40 Stat. 1316, is as follows:

"That jurisdiction is hereby conferred upon the court of claims to hear, consider, and determine the claim

of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the court of claims of May eighteenth, nineteen hundred and five (Fortieth Court of Claims Reports, page two hundred and fifty-two) in favor of the Cherokee Nation. The said court is authorized, empowered, and directed to carefully examine all laws, treaties, or agreements, and especially the agreement between the United States and the Cherokee Nation of December nineteenth, eighteen hundred and ninety-one, ratified by the United States, March third, eighteen hundred and ninety-three (Twenty-seventh Statutes at Large, page six hundred and forty, chapter two hundred and nine, section ten), in any manner affecting or relating to the question of interest on said funds, as the same shall be brought to the attention of the court by the Cherokee Nation under this act. And if it shall be found that under any of the said *treaties, laws, or agreements interest on one or more of the said funds, either in whole or in part, has not been paid and is rightfully owing from the United States to the Cherokee Nation*, the court shall render final judgment therefor against the United States and in favor of the Cherokee Nation, either party to have the right to appeal to the Supreme Court of the United States as in other cases." (Italics Supplied.)

The pertinent portion of the jurisdictional Act of April 25, 1932, 47 Stat. 137, is as follows:

"That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, *to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Cherokee Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs*, which said Cherokee Nation or Tribe

> may have against the United States which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States." (Italics Supplied.)

Statement

Pursuant to the right given Indian tribes, or bands, to present claims against the United States to the Indian Claims Commission, a petition was filed with the Commission by your petitioners for the recovery of losses alleged to have been sustained by reason of the failure of the United States to observe the rule of partial payments, in taking credit for payments made on account of a long overdue, interest bearing obligation. The authority of the Indian Claims Commission to award a recovery for such losses was alleged in the petition to have been conferred upon that Commission by the provisions of clause (5) of Section (2) of the act creating the Commission which is as follows:

> * * *; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

The Indian Claims Commission dismissed the petition on motion of the United States on the ground that the claim had been formerly adjudicated on its merits. On appeal from the judgment of the Commission the Court of Claims affirmed the judgment for the following reasons:

> (a) That the action was one for the recovery of interest, and that that action had been formerly adjudicated.
>
> (b) That clause (5) of Section (2) of the act creating the Indian Claims Commission was not intended to embrace such a claim as the one presented, because the claim is not of a "fundamental character."

Your petitioners, the Western (Old Settler) Cherokee Indians are the Cherokee Indians who migrated to lands lying west of the Mississippi River pursuant to the treaty

of 1817 (7 Stat. 156). The Eastern (Emigrant) Cherokee Indians are the Cherokees who moved to lands west of the Mississippi River pursuant to the provision of the treaty of December 29, 1835 (7 Stat. 439).

By the terms of the treaty of 1835 the Cherokee Indians ceded all their lands then lying east of the Mississippi River to the United States for a consideration of $5,000,000, from which sum certain deductions were to be made, and the remainder thereof was to be distributed *per capita* among the members of the tribe.

The validity of the treaty of 1835 was disputed by both the Eastern and Western branches of the Cherokee tribe, however, by the terms of the treaty of 1846, 9 Stat. 871, to which all branches of the tribe were parties, the cession of the land as made in the 1835 treaty was confirmed, and the obligation to make a *per capita* distribution of the residue of the money named as a consideration for the cession was required thereunder to be distributed *per capita*. The Indians having complained that in view of the fact the residue of the purchase money had not been distributed *per capita* as agreed, interest should be paid thereon from the time said distribution should have been made. By reason of their complaint the treaty of 1846 provided that the question of interest be left for determination to the Senate of the United States. Thereafter the Senate adopted the following resolution:

> "*Resolved*, That it is the sense of the Senate that interest at the rate of 5% per annum should be allowed upon the sums found due the 'Eastern' and 'Western' Cherokees respectively, from the 12th day of June, 1838, until paid."

The Cherokees at no time agreed or consented that the disbursement of the moneys which were required by the said treaties to be paid promptly be delayed, or that the same be held as an investment.

In a statement of the accounting officers of the Treasury, setting up the moneys which, under the treaties of 1835 and 1846 ohsuld be distributed *per capita* to the Western (Old Settler) Cherokees, it was shown that said amount was $523,782.18 with interest thereon from June 12, 1838. Thereupon by act of September 30, 1850 (9 Stat. 544) Congress appropriated that amount with interest which was distributed *per capita* to the Western Cherokees. However, the amount of moneys which should have been so distributed at that time was $799,891.62 with interest thereon. (United States v. Old Settler or Western Cherokee Indians, 148 U. S., 427, 457-461).

Reasons for Granting the Writ

1. The Indian Claims Commission, in deciding this case on the Government's motion to dismiss the petition, concluded that the case as presented in the petition was one for consideration "by the Commission under clause (1) of section 2 of the Act," creating the Indian Claims Commission. Clause (1) of Section 2 of the act authorizes the determination of "Claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President." On that basis the Commission held that the case had been formerly adjudicated, and thereupon dismissed the petition. On appeal the Court of Claims sustained the action of the Indian Claims Commission. Although the Court of Claims gave consideration to the contention of petitioners that the claim asserted came within the scope of the jurisdiction granted in clause (5) of Section (2) of the act, which authorizes the determination of "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity," its conclusions were, in substance as follows:

> 1. The claim asserted in the petition is one for the recovery of interest and that the claim for interest had been formerly adjudicated.

2. That clause (5) of Section (2) of the act creating the Indian Claims Commission does not authorize the determination of the claim asserted because the claim is not of a "fundamental character."

With respect to the first of the Court's conclusions petitioners say that the claim asserted is not a claim for interest, but a claim for part of the principal debt which, if fair and honorable dealings had been employed by the Government, would now stand on the records as due petitioners. That such balance would bear interest has been determined by agreement of the parties. With respect to the second conclusion of the Court of Claims petitioners say that the claim based upon the failure of the Government to observe the rule of partial payments, in the circumstances of the cases, is a claim of a "fundamental character" in that such failure constitutes unfair and dishonorable dealings, which the Congress has made the foundation for relief in actions before the Indian Claims Commission. C/f Sioux Tribe of Indians v. The United States, 329 U. S. 684.

This is the first case in which a petition for a writ of certiorari has been presented to the Supreme Court to review a judgment of the Court of Claims in a case appealed from the Indian Claims Commission.

If, therefore, there be error in the decision of the Court of Claims with respect to the application of the rule of *res judicata*, or in the Court's determination of the scope of the act creating the Indian Claims Commission, it is of great importance not only to the many Indian tribes who have presented, and will present, claims under the authority of that act for adjudication, but to the United States.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILFRED HEARN,
Attorney for petitioners,
successor to Woodson E. Norvell,
deceased.

September 27, 1950.

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BRIEF

Opinions Below

In the opinion of the Indian Claims Commission it was held that the claim asserted in the petition could be considered only as a claim authorized to be heard and determined by the Commission under clause (1) of Section (2) of the act creating the Commission, which clause provides for the determination of "claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President," and that such a claim had been formerly adjudicated.

In the opinion of the Court of Claims it was held:

(a) That the claim is for interest, and that the claim had been adjudicated;

(b) That clause (5) of Section (2) of the act creating the Indian Claims Commission did not embrace the claim because the claim was not of a "fundamental character."

Specifications of Error Which Justify the Granting of the Writ

1. The Indian Claims Commission erred in holding that the claim asserted in the petition could be considered only as a claim authorized to be adjudicated under clause (1) of section (2) of the act creating the Indian Claims Commission.

2. The Court of Claims erred in holding that the claim asserted is one for interest, and, that the claim for interest had been formerly adjudicated.

3. The Court of Claims erred in holding that clause (5) of section (2) of the act creating the Indian Claims Commission did not authorize the adjudication of petitioners' claim because the claim was not of "fundamental character."

Summary of Argument

1. The defense of *res judicata* is not sufficient because:

(a) No court had been authorized to determine the question here in issue;

(b) Because no court has made a determination of that issue.

The former cases were determined under the authority of jurisdictional acts which limited the authority to adjudicate claims arising out of treaties, agreements and acts of Congress. The instant case is based upon the failure of the Government to deal fairly and honorably, and it is being prosecuted under the authority of an act of Congress which authorized a recovery in a case where the Government has failed to deal fairly and honorably.

2. The conclusion of the Court of Claims that the case is one merely for the recovery of interest is not sustained by reason or precedent. The fundamental question is whether, under the circumstances of the case, the government dealt "fairly and honorably." The interest feature of the case is purely incidental.

Argument

1. *There has not been a former adjudication of an action based upon the failure of the United States to deal fairly and honorably with your petitioners with respect to the observance of the rule of partial payments.*

In reaching the conclusion that the claim here involved had been formerly adjudicated the Court of Claims had to conclude that there was authority to adjudicate the claim on the former trials.

The jurisdictional act under which the case of *Western (Old Settler) Cherokees* v. *The United States* (27 C. Cls. 1;

148 U. S. 427) was brought limited the jurisdiction of the court to claims "arising from or growing out of any treaty stipulations and acts of Congress relating thereto."

The act authorizing the claims asserted in the case of the *Western or Old Settler Cherokee Indians* v. *The United States* reported in 82 C. Cls. 456 limited the jurisdiction of the Court to claims "arising or growing out of any treaty or agreement between the United States and the Cherokee Indians, or arising or growing out of any act of Congress in relation to Indian affairs."

In the case of the *Cherokee Nation* v. *The U. S.*, 59 C. Cls. 465, 270 U. S. 479, the jurisdictional act granted the right to recover "* * * if it shall be found that under any of *said treaties, laws, or agreements* interest on one or more of said funds, either in whole or in part has not been paid and is rightfully owing from the United States to the Cherokee Nation the Court shall render final judgment therefor * * *." (Italics supplied.)

Thus, it appears that in not one of said jurisdictional acts has authority been granted to adjudicate a claim based upon the failure of the United States to observe the fair and just rule of partial payments in taking credit for payments made on an overdue interest bearing indebtedness. Moreover in only one of the decisions rendered in the cases prosecuted under the authority of said acts has the question with respect to the application of that rule been passed upon, or even mentioned as being an issue in the case. That was the case of *Western or Old Settler Cherokees* v. *The United States*, 82 C. Cls. 456. There it was contended that a proviso contained in Section 3 of the jurisdictional act authorized the Court to apply the rule of partial payments. However, the Court held that the proviso was procedural and "lays down the manner in which partial payments are to be applied on claims sued upon which come within the jurisdiction of the court as defined in Section 1 of the Act," and that the Court

had no authority to apply the rule of partial payments in the case authorized to be determined by the jurisdictional act.

Therefore, in the absence of authority granted in the jurisdictional acts under which the former cases were adjudicated to hear and determine a case predicated on moral grounds, your petitioners submit that the claims here asserted could not have been adjudicated.

The following facts with respect to the claim now asserted were established in the former decisions:

(a) By the terms of the treaty of 1835 a certain part of the consideration moving to the Indians for their cession of the lands lying east of the Mississippi River was to be distributed *per capita* to the Indians to aid them in reestablishing their homes in their new country.

(b) The amount of money which should have been so distributed to your petitioners was $799,891.62.

(c) In 1846 another treaty was entered into whereby the parties agreed that the Senate should determine whether interest should be paid on the fund which should have been distributed *per capita*. The Senate determined that said moneys should bear interest from June 18, 1838, at the rate of five per cent per annum until paid.

(d) That the 1846 treaty ratified the agreement in the treaty of 1835 that the disbursement of the per capita fund be made promptly.

(e) That in 1950 the accounting officer of the United States erroneously determined that the fund to be distributed per capita was $527,782.18 with interest thereon from June 18, 1838, that being the date the Senate held that the disbursement should have been made in accordance with the treaty obligation.

(f) That pursuant to that determination Congress appropriated the principal amount of $523,782.18 with interest thereon which was then disbursed to the West-

ern Cherokee per capita, at which time the principal amount of the indebtedness was in fact $799,891.62 and the accrued interest thereon was approximately $483,-130.00, a total of approximately $1,283,100.00.

(g) That no treaty, agreement or understanding between the parties had the effect of relieving the United States of the treaty obligation to make prompt distribution of the moneys which were required by said treaties to be made *per capita*.

Your petitioners feel justified in saying that had the jurisdictional act of February 25, 1889 (25 Stat. 694) under the authority of which petitioners made a recovery, authorized the Court to hear and determine a claim based upon "fair and honorable dealings" then in that case the Court could and would have applied the rule of partial payments.

It would be difficult to find a case where the application of the rule of partial payments would have greater justification than the one here presented.

In the case of *Story* v. *Livingston*, 13 Pet., 359, 371, this Court announced the rule of partial payment to be as follows:

> "The correct rule in general is that the creditor shall calculate interest whenever a payment is made. To this interest the payment is first to be applied; and if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment fall short of the interest, the balance of interest is not to be added to the principal so as to produce interest. This rule is equally applicable, whether the debt be one which expressly draws interest, or one which interest is given in the terms of damages."

The foundation of the rule is found in its fairness and justness. Therefore, in not one of the cases formerly adjudicated has the court had the authority to apply the rule because the actions permitted to be adjudicated were required to arise out of treaty stipulations.

2. *This is not a case for the Recovery of Interest.*

That the moneys involved in this case did bear interest was determined by an agreement between the parties. The common law rule and the statutory law with respect to the liability of the United States for interest on overdue payments of moneys has no application here because there was an agreement to pay interest. To say, as it is said in the opinion of the Court of Claims, that this case is one for the recovery of interest, contradicts both fact and reason. The claim here presented is one based upon the failure of the United States to observe the rule of partial payments, because in the circumstances of the case the duty of "fair and honorable dealing" required the observance of that rule.

3. *The Claim Asserted is of a Fundamental Character.*

The Court of Claims having held that the claim here involved was one for interest and that the claim had been adjudicated, also held that the claim was not authorized to be adjudicated under clause (5) of Section (2) of the act creating the Indian Claims Commission because the claim is not of a 'fundamental character" (R. 38).

It has been shown that the claim asserted has not, and could not have been, adjudicated under the authority of the former jurisdictional acts because the claim was a moral one. However, the Congress has authorized the Indian Claims Commission to adjudicate claims "based upon fair and honorable dealings." Therefore, the Congress has made the failure of the United States to deal fairly and honorably with Indian tribes the basis of claims which the Commission is authorized to adjudicate.

The narrow application given by the Court of Claims to clause (5) of Section (2) of the Indian Claims Commission act is not supported by the clear meaning of the language

employed in the act or by its history. Section 11 of the act contains this proviso:

> Provided further, that the Court of Claims in any suit pending before it at the time of the approval of this act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit.

The proviso authorized the Court of Claims to determine any claim based upon "fair and honorable dealings" in a pending action no matter what the original authority of the Court with respect to the claim was, or what the subject of the action be. In the case of the *Sioux Tribe of Indians* v. *The United States* (329 U. S. 684) the Supreme Court vacated a previous order denying certiorari and granted the petition for the writ and thereupon entered the following order:

> The judgment is vacated and the case is remanded to the Court of Claims in order to enable that court to determine whether the Act of August 13, 1946, gives rise to any claims which petitioners may assert to affect the judgment theretofore entered in this cause, as to which this Court means to intimate no opinion.

Thereupon the Court of Claims, having reconsidered the case made the following finding of fact:

> On the record we find no substantial support for the view that fair and honorable dealing, within the meaning of that term as used in sections 2 and 11 of the Act of August 13, 1946, requires or justifies the conclusion that these expenditures should be charged to the Government rather than to the Plaintiff. (112 C. Cls. 50, 57).

In the opinion of the Court of Claims in the instant case it is said: (R).

> "Clause (5) [referring to clause (5) of the act creating the Indian Claims Commission] obviously has reference to the fundamental character of the claim rather than the theory upon which an Indian tribe or band may seek to invoke the jurisdiction of the Indian Claims Commission."

If the foregoing statement was intended to mean that a claim based upon the failure of the United States to apply the rule of partial payments, under the circumstances shown in the record here, was not of a fundamental character, then your petitioners submit that there is a glaring conflict between that determination and the opinion of the Supreme Court in the *Sioux* case (329 U. S. 684).

In the *Sioux* case the limitations with respect to jurisdiction were the same as in the *Cherokee* cases, but the Supreme Court remanded the case because a *fundamental issue* had arisen by reason of the provisions of the act creating the Indian Claims Commission, which authorized the determination of actions arising out of the failure of the United States to deal fairly and honorably.

Conclusion

For the reasons hereinbefore set forth your petitioners respectfully submit that their petition for the writ of certiorari should be granted.

WILFRED HEARN,
Attorney for petitioners,
successor to Woodson
E. Norvell, deceased.

September 27, 1950.